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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

SEPTEMBER TERM, 1958

No. 720

JAMES H. LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## INDEX

### Subject Index


| | Page |
|---|---|
| PETITION FOR WRIT OF CERTIORARI | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 4 |
| Reasons for Allowing the Writ | 7 |
| Argument | 8 |
| Conclusion | 13 |


### Table of Cases


Bell v. United States, 349 U.S. 81 ..... 9

Bramblett v. United States, 231 F 2d 489 ..... 9

Greene v. United States, 246 F 2d 677 ..... 11, 13

Hirabayashi v. United States, 320 U.S. 81 ..... 12

Ladner v. United States -U.S.-, 3L ed. 2d 199 ..... 9

Nilva v. United States, 352 U.S. 385 ..... 13

United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218 ..... 9


### Table of Statutes


Title 22, D.C. Code, Section 1501 ..... 3

Title 22, D.C. Code, Section 1502 ..... 3


### Constitution


UNITED STATES CONSTITUTION

Fifth Amendment ..... 4

IN THE

# Supreme Court of the United States

SEPTEMBER TERM, 1958

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No. .....

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JAMES H. LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered December 4, 1958. The said judgment of the Court of Appeals affirmed two judgments of convictions that were entered by the United States District Court for the District of Columbia following two jury trials in the District Court upon indictments that charged violations of the District of Columbia lottery laws. 31 Stat. 1330 (1901), as amended, 22 D.C. Code 1501 (1951) and 52 Stat. 198 (1938), as amended, 22 D.C. Code 1502 (Supp. VI, 1958). The Appeals from the two cases were consolidated in the Court of Appeals.

## OPINIONS BELOW

There was no opinion written by either of the trial judges of the United States District Court for the District of Columbia.

The opinion of the United States Court of Appeals which was rendered on December 4, 1958, is printed in slip form but has not yet been printed in the official reports of the Federal Reporter; the opinion, however, is contained in the certified transcript of record submitted herewith (R. 134-136) and is also appended hereto.

The petition for rehearing was denied without written opinion by the Court of Appeals on January 12, 1959. (R. 145).

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was dated and entered December 4, 1958. (R. 137).

The petition for re-hearing (R. 138-144) was denied January 12, 1959. (R. 145). Application was made to this Honorable Court for an extension of time to February 21, 1959 in which to file the Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

## QUESTION PRESENTED

Whether, Title 22, Section 1501 of the D.C. Code, is properly interpreted as expressing the Congressional intent to penalize thereunder a single course of conduct rather than the several acts that evidence that course of conduct?

Where the wording of Title 22, Section 1501 of the D.C. Code, demonstrates that Congress intended to create but a single offense and that contrary to this intention an accused is charged and convicted of more than one offense arising from a single course of conduct under the statute, does the rule relating to concurrent sentences (*Hirabayashi v. United States*, 320 U.S. 81) preclude him from com-

plaining about the prejudice that results from this unfair and illegal manner of charging?

## STATUTES INVOLVED

31 Stat. 1330 (1901), as amended, 22 D.C. Code § 1501 (1951):

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery, or shall sell or transfer any ticket, certificates, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

52 Stat. 198 (1938), as amended, 22 D.C. Code § 1502 (Supp. VI, 1958):

> If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be

imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

**United States Constitution**

Fifth Amendment to the Constitution:

No person shall be held to answer for a capital or otherwise infamous crime unless a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

## STATEMENT OF THE CASE

The petitioner was tried twice in the United States District Court for the District of Coumbia in the year of 1958, upon indictments that charged him with violations of the District of Columbia lottery laws. The two indictments were identical in their essential respects. Count 1 in each indictment charged that continuously, during a certain two week period, the petitioner was concerned as owner, agent and clerk and in other ways, in managing, carrying on and promoting a lottery known as the numbers game in the District of Columbia. Counts 2, 3, and 4 of each indictment alleged that on three specific occasions within the two week period embraced in count 1, the petitioner sold and transferred to another a chance, right and interest in a lottery known as the numbers game. Count 5 of the indictments charged that the petitioner had in his possession and under his control, on the last day of the two-week period charged in count 1, writing used and to be used in a lottery.

The sixth count alleged that the petitioner, during the two-week period, was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411. In one case (United States District Court, Criminal No. 512-57) the period was from January 11, 1957 to January 18, 1957, and in the other case (District Court, Criminal No. 1156-57), the period was September 24, 1957 to October 1, 1957, inclusive. In each case, the testimony offered by the Government against the petitioner followed somewhat the same pattern. On the first day of the two-week period set forth in count 1 of the indictment, the petitioner was observed by undercover officers of the Metropolitan Police Department to make contacts with third persons under circumstances that led the officers to believe that he was accepting numbers bets from these persons. Thereafter, on the next day, an undercover man allegedly contacted the petitioner and placed numbers bets with him. The officer allegedly placed bets with the petitioner twice again during the two-week period. On the last day of the two-week period in each case, the petitioner was arrested and certain papers allegedly numbers slips were seized from his personal custody.

A motion was filed in each case, prior to trial, to dismiss all counts subsequent to count 1 respectively, on the grounds that the subsequent counts were included in count 1 and that the indictment was therefore duplicitous. (R. 11, 88). The motions were urged to the respective trial courts after the Government had made its opening statement. (R. 12, 91). Each trial judge denied the motion without prejudice, and indicated that the motion could be renewed at an appropriate time later in the trial. (R. 13, 92). At the close of the Government's case, petitioner's attorney, in each cause, again moved the court to dismiss. (R. 51, 117). At the close of all the evidence in the respective cases, the petitioner again moved the court to compel the Government to elect between count 1 of the indictment or counts

2, 3, 4 and 5 thereof; or, in the alternative, to dismiss counts 2, 3, 4 and 5 of the indictment. (R. 62b, 120). At every instance that the foregoing motions were made to the courts, they were denied. (R. 12, 58, 64, 92, 118, 120).

In the first case to be tried (No. 1156-57 in the District Court) count 6 was dismissed on motion of the government. Of the remaining 5 counts, which were submitted to the jury, the petitioner was found guilty on counts 1, 4 and 5, and not guilty of counts 2 and 3. The sentences in this case were as follows:

> "Eight (8) months to Two (2) years on Count One, Eight (8) months to Two (2) years on Count Four, and One (1) year on Count Five. Said sentences by the counts to run concurrently." (R. 80).

In the other case (512-57 in the District Court) count 6 was dismissed by the Government during trial and count 4 was dismissed by the Government when the jury, after deliberation, could reach no agreement concerning that offense. The petitioner was convicted by the jury on counts 1, 2, 3 and 5, and the following sentences were imposed:

> "One (1) year to Three (3) years on counts 1, 2, and 3. One (1) year on count 5; said sentences to run concurrently; said sentences to take effect at the expiration of sentences imposed in criminal case No. 1156-57." (R. 132).

An appeal was taken from the conviction in each case to the United States Court of Appeals for the District of Columbia Circuit.[1] (R. 80, 132). The two appeals were consolidated for hearing and disposition.

The principal point raised in each appeal was that it was error for the respective courts to deny the petitioner's motion to compel an election between count 1 and the four subsequent counts of each indictment, or alternatively, in failing to dismiss either count 1 or the four following counts. The petitioner premised his claim of error in this

---

[1] Pursuant to the authority of Title 28 Section 1291 of the United States Code, and Rule 37 of the Federal Rules of Criminal Procedure.

regard upon the theory that the wording of the statute (T22-Sec. 1501 of the D.C. Code) under which the four counts were laid indicated that Congress intended the allowable unit of prosecution thereunder to be a single course of conduct, and not the several acts that comprise same. The Court of Appeals in rendering its judgment in the consolidated case (on December 4, 1958) declined to meet the question raised by the petitioner in his appeals because in the court's view, concurrent sentences were imposed and under the law, the petitioner could not complain, "as any such error would be cured by the concurrent sentences. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Pauzer* v. *United States*, 93 U.S.App.D.C. 412, 208 F.2d 45 (1953)." (R. 135).

After the Court of Appeals had entered its judgment in the cases and before the expiration of the time allowed for the filing of a petition for a rehearing, the petitioner duly filed a petition for rehearing en banc and same was denied on January 12, 1959.

## REASONS FOR THE ALLOWANCE OF THE WRIT

In this case, the United States Court of Appeals for the District of Columbia Circuit declined to decide the principal question (raised upon appeal) as to what the allowable unit of prosecution is under Title 22, Section 1501 of the D.C. Code. The Court in its opinion, would not consider the question because concurrent sentences were imposed.

It is respectfully urged that this Petition for a Writ of Certiorari to review the judgment of the Court of Appeals be granted because:

(1) The court below misinterpreted and misapplied the principle enunciated by this Court in the *Hirabayashi* case, in that it assumed that under the rule of the *Hirabayashi* case an accused who is improperly charged in a multi-count indictment, under a statute which sets forth but a single offense, is precluded from complaining of the violation of his rights to substantive and procedural due process, even

though the violation arises directly from his being so charged.

(2) That a decision and determination by this Honorable Court of the question herein presented will be of infinite value to the Federal Judiciary at large.

(3) The holding of the court below leaves those of the bench and bar of the District of Columbia, who are required to deal with the statute, uncertain as to its correct interpretation and application, and this thereby: (a) creates a situation which is inimical to the due and orderly administration of federal criminal law in the District of Columba; and, (b) lends itself to a lack of uniformity in the treatment and application of the statute.

## ARGUMENT

### 1.

Title 22, Section 1501 of the District of Columbia Code prohibits but one general crime, even though there are a variety of ways by which the statute may be violated. The broad purpose of the statute is to make it a crime for one to be concerned in the operation of a lottery and to do certain enumerated things in connection therewith, or in furtherance thereof, which evidences that the person so doing these things is concerned in operating a lottery. That is, if one sets up or promotes a lottery, or becomes concerned in a lottery, or does certain specifically prohibited acts, he is guilty of violating the broad purpose made criminal by the statute. The statute does not create several offenses. The offense made punishable by the statute is a course of conduct. It is the course of conduct—the operation of a lottery—rather than the separate acts in such course that constitutes the punishable offense.

In any event, the statute may as reasonably be read to mean that it prohibits a single offense, as it may be read to mean that it creates many offenses. "Neither the wording of the statute nor its legislative history points clearly,

to either meaning. In that circumstance the court applies a policy of lenity and adopts the less harsh meaning." *Ladner* v. *United States* (1959) —— U.S. ——, 3 L. Ed. 2d. 199, 79 S.Ct. ——; *United States* v. *Universal C.I.T. Credit Corporation* (1952), 344 U.S. 218, 97 L. Ed. 260, 73 S.Ct. 277; *Bell* v. *United States* (1955), 349 U.S. 81, 99 L. Ed. 905, 75 S.Ct. 620; See also *Bramblett* v. *United States* (1956, D.C. Cir.), 231 F. 2d 489, 491.

This Court expressed the principle in the *Universal C.I.T. Credit Corporation* case, which was reiterated in the *Bell* and *Ladner* cases (*supra*), that where Congress has not spoken clearly as to what conduct is made criminal under a statute, an interpretation should be reached in favor of the accused. In consonance with this principle, the petitioner deems that in the instant case it was error for the trial courts to submit the cases to the jury on all of the first five counts of the respective indictments. The trial courts, upon the petitioner's request, should either have dismissed the first count or the subsequent four counts, or alternatively, should have compelled the government to elect between them.

The failure of the Court of Appeals to reach the question of statutory construction leaves the bench and bar of the District of Columbia still uncertain concerning the correct meaning of the statute. Most indictments returned in the District of Columbia that are laid under the statute contain a count (usually the first, as in the instant cases) that charges the offender with being continuously concerned during the stated period "as owner, agent and clerk, and in other ways, in managing, carrying or and promoting a lottery known as the numbers game." More often than not, subsequent counts of the indictment charge the offender under the same statute, as here, with selling chances in the same lottery during the same period of time set forth in the first count of the indictment. So it is seen that the problem is a constantly recurring one, since the practice remains the same and continues. One need look no further than

the comments of one of the District Court Judges in the instant case to appreciate the truthfullness of the foregoing statement. In passing upon the petitioner's motion to compel an election between count one and the other three counts under Title 22, Section 1501, the court (in case no. 1176-57) said:

"(IN CHAMBERS)

"THE COURT: I am hard to convince when I get my mind set on something, but last night I began to waiver a little bit and I am still waivering about the question of the election. I am inclined to think that this situation does differ from that of a narcotics case, statutes and three separate sections, or two statutes.

"As I recall it, this is one statute which does denounce, as I see it, three different offenses, or says that there are three different ways in which one offense can be committed, and it would follow that if a man consistently, for a substantial period of time, sells lottery tickets, he is thereby operating a lottery, because the statute says further whoever does that is operating a lottery.

"I don't believe if he sells one of them or two of them or maybe three of them from time to time—I don't know. We don't have to deal with them; he would be operating a lottery. I think it has to be numerous enough to make it a substantial selling operation, to substantiate a lottery. When he does that, he is operating a lottery, and each time he does it, he commits an offense because it is against the law to accept a numbers bet or sell a ticket in a lottery. So that the proof of those Counts 2, 3, 4, and 5, I guess, although five is a separate, under a separate statute, 2, 3, and 4. The proof under those three counts prove Count 1. Count 1 has got to be proved by proof of sale of lottery tickets or authority to sell by someone else, lottery tickets.

"I am wondering now if counsel for defendant aren't right; that you have got to go the jury now, separating Count 1 from the three other counts. I am doubtful if you can go on both. I know I couldn't sentence separ-

ately, but I think they may be possibly the same.'" (R. 62,63).

In light of the above indicated authorities, it was obvious error for the trial courts to have refused the petitioner's request for relief, and this error, the petitioner contends, prejudicially affected his substantive and procedural rights of due process, notwithstanding the fact that concurrent sentences were imposed. The petitioner finds it difficult to reconcile the rationale of the Circuit Court of Appeals (as expressed in its opinion) with his Constitutional right to a fair trial. The Court of Appeals held that the error complained of, was cured by the concurrent sentences. To the petitioner, this is inconceivable.

The petitioner submits that it is incorrect to say that he was not prejudiced in his fundamental rights by the failure of the trial courts to compel an election between the counts or to dismiss the objectionable counts, simply because the sentence imposed was within the maximum that could be imposed upon any one offense. It is urged that in facing the proposition herein this Court should "follow the principle recently expressed in *United States v. Pagano*, 2 Cir. 1955, 224 Fed. 682, 683, that convictions are not to be affirmed in such a case 'unless the whole trial was conducted with the most scrupulous exactness'."[2]

The charging of the appellant in the manner done here violates his right to procedural and substantive due process under the Fifth Amendment of the United States Constitution. The prejudice to his rights in this regard, in charging him with many crimes where there is only one, goes further than can possibly be corrected by imposing concurrent sentences. This method of charging is evil and hurtful to the appellant's right, in that: (1) it allows the prosecutor to present his evidence in a loose and blunderbus fashion; (2) the jury is likely to be improperly led to the

[2] Dissenting opinion of Circuit Judge Bazelon in *Green v. United States* (1957, D.C. cir.) 100 U. S. App. D.C., 396, 246 F. 2d 677 at page 681; and see also footnote nine appended to above quoted language.

conclusion that an accused who is charged with multiple offenses is at least guilty of some of them; and more importantly (3) the fact that the Court has permitted the jury to consider all of the charges, leads the jury to believe that it is the judge's legal opinion and the law that there is sufficient evidence to warrant conviction, if believed by them. None of these instances of error could conceivably be cured by the imposition of concurrent sentences.

If what the petitioner has said hereinbefore is correct, that is, that certain irreparable prejudices attend the charging of several crimes where there is only one, and that such prejudice prevented him from having a fair trial, it is all the more noteworthy that upon conviction of two offenses, or several, when he should only have been convicted of one, he is marked as a felon many times over. *This stigma cannot be eradicated by a concurrent sentence.* Certain civil disabilities are necessarily suffered by one who has been convicted of a felony and surely it must stand to reason that one who has been convicted of several felonies is more gravely affected. How can it be said that these abuses are corrected by a concurrent sentence. It is time for this Court to say that refuge may not be sought in the imposition of concurrent sentences where fundamental error has been committed. The rule that reversal is not required if any one of several concurrent sentences is valid and alone supports the sentence and judgment (*Hirabayashi v. United States*, 320 U.S. 81, 85, 63 S Ct. 1375, 1378, 87 L. Ed. 1774) cannot be exalted above basic constitutional rights and accepted as a panacea for all abuses to them.

There is another reason that prevails against the doctrine of no prejudice because of the sentence. For it cannot be assumed:

> "... that the District Court would have imposed the same aggregate sentence ... It was said in *Fulton v. United States*, 1916, 45 App. D.C. 27, 42:
>
> 'Moreover, while the sentence imposed does not exceed the maximum penalty possible under a convic-

tion upon either Count, it is mere conjecture to say that the Court was not influenced by the double conviction'."[3]

In the case of *Nilva v. United States* (1957), 352 U.S. 385, 77 S.Ct. 431, 1 L. Ed. 2d. 415, this Court had before it as one of the questions involved: Whether a general sentence upon a conviction for three offenses of contempt should not be remanded for sentencing where the government abandoned two of the offenses. This Court, in deciding this question said:

> "There remains a question as to petitioner's general sentence. It was imposed following his conviction on each of the three original specifications. Although the government now undertakes to sustain but one of the convictions, it contends that petitioner's sentence should be left as it is because it was within the trial Court's allowable discretion. We believe, however, that the Court should be given an opportunity to reconsider petitioner's sentence in view of the fact that his conviction rests solely on the third specification."

[3] Dissenting opinion of Circuit Judge Bazelon in *Green* v. *United States*, *supra*, note 14.

## CONCLUSION

In view of the obvious necessity and importance of settling the question of statutory construction involved herein, it is prayed that this Court grant the Writ and Hold that the trial courts should have either compelled the government to elect between count one or the three following counts, or alternatively to have dismissed the second, third and fourth counts.

Respectfully submitted,

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"EXHIBIT A".

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958.

No. 14,601
Criminal 1156-57

JAMES H. LEWIS, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

September Term, 1958

Criminal 512-57
No. 14,617

JAMES H. LEWIS, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the District of Columbia

*United States Court of Appeals for the District of Columbia Circuit*, filed December 4, 1958, Joseph W. Stewart, Clerk.

Before: BAZELON, BASTIAN and BURGER, Circuit Judges.

## JUDGMENT

These cases came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed.

PER CURIAM

Dated: December 4, 1958.

Separate concurring opinion by Circuit Judge BAZELON.

"EXHIBIT B"

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 14,601, 14,617

JAMES H. LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

Appeals from the United States District Court for the District of Columbia

---

Decided December 4, 1958

*Mr. Curtis P. Mitchell*, with whom *Mr. John A. Shorter, Jr.*, was on the brief, for appellant.

*Mr. John D. Lane*, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief for appellee. *Mr. Edgar T. Bellinger*, Assistant United States Attorney, also entered an appearance in No. 14,617 for appellee.

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

PER CURIAM: These are appeals from two convictions upon two consolidated indictments charging violations of the District of Columbia lottery laws.[1] The principal question presented is, as stated by appellant: "Where one

[1] Title 22, Sections 1501, 1502, D. C. CODE.

has been charged in a count of an indictment with operating for a given period of time a lottery in violation of Title 22, Section 1501 of the D. C. Code, may be also be charged in another subsequent count of the indictment with having violated the same statute during the same period by having sold a chance in the same lottery." The Government, on the other hand, contends that operating a lottery and the sale of numbers are separate offenses.

However, concurrent sentences were impo l in these cases;[2] and, under well settled rules, even if there were merit in this claim of error (which we by no means hold), appellant cannot complain, as any such error would be cured by the concurrent sentences. *Cf. Hirabayashi v. United States*, 320 U.S. 81 (1943); *Wanzer v. United States*, 93 U.S.App.D.C. 412, 208 F.2d 45 (1953).

We have examined the other questions presented and find no error.

*Affirmed*

---

[2] In the case giving rise to Appeal No. 14,617, appellant was indicted on May 27, 1957, and was found guilty on Count 1, operating a lottery from January 11, 1957 to January 18, 1957; Count 2, sale of numbers to one Carter on January 12, 1957; Count 3, sale of numbers to Carter on January 16, 1957; Count 5, possession of numbers slips on January 18, 1957. He was sentenced to serve one to three years on Counts 1, 2 and 3, and to serve one year on Count 5, all sentences to run concurrently.

In the case giving rise to Appeal No. 14,601, appellant was indicted on December 3, 1957, and was found guilty on Count 1, operating a lottery from September 24, 1957 to October 1, 1957; Count 4, sale of numbers to one Bigelow on October 1, 1957; Count 5, possession of numbers slips on October 1, 1957. He was sentenced to serve eight months to two years on Count 1, eight months to two years on Count 4, and one year on Count 5, all sentences to run concurrently.

The sentences in No. 14,617 were ordered to be served at the expiration of the sentences imposed in No. 14,601.

BAZELON, *Circuit Judge*, concurring: I would affirm solely on authority of *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Wanzer* v. *United States*, 93 U.S.App.D.C. 412, 208 F.2d 45 (1953); *Greene* v. *United States*, 100 U.S.App.D.C. 396, 246 F.2d 677 (1957), *cert. granted*, 78 S.Ct. 1386 (1958), but see my dissent therein.

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES H. LEWIS, PETITIONER,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Argument | 5 |
| Conclusion | 6 |


## CITATIONS

Cases:


*Coupe* v. *United States*, 113 F. 2d 145, certiorari denied, 310 U.S. 651 ..... 6

*Hirabayashi* v. *United States*, 320 U.S. 81 ..... 5


Statutes:


31 Stat. 1330 as amended, 22 D. C. Code § 1501 (1951 ed.) ..... 2, 3, 4, 5

52 Stat. 198, as amended, 22 D. C. Code § 1502 (Supp. VI, 1958) ..... 3, 4

# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 720

JAMES H. LEWIS, PETITIONER,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (R. 134-136) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 4, 1958 (R. 137). A petition for rehearing (R. 138-144) was denied on January 12, 1959 (R. 145). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to February 21, 1959, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, where petitioner was given concurrent sentences for operating a numbers lottery, engaging in numbers sales and possessing numbers slips, the court properly found that there was no occasion to consider petitioner's contention that the counts charging possession and sale merged in the charge of operating a lottery.

## STATUTES INVOLVED

31 Stat. 1330, as amended, 22 D. C. Code § 1501 (1951 ed.) provides:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such

chance, right, or interest, or of any such ticket, certificate, bill, token or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

52 Stat. 198, as amended, 22 D.C. Code § 1502 (Supp. VI, 1958) provides:

> If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

## STATEMENT

Two indictments in the United States District Court for the District of Columbia were separately tried, resulting in two convictions which were consolidated for review. In No. 14,617 (Crim. No. 512-57) petitioner was found guilty by the jury (R. 129-130) on count 1 (promoting a lottery from about January 11 to January 18, 1957 in violation of 22 D. C. Code

§ 1501 (1951 ed.), *supra*, p. 2); count 2 (numbers sale to one Carter on January 12, 1957, in violation of 22 D. C. Code § 1501); count 3 (similar sale to Carter on January 16, 1957); and on count 5 (possession of numbers slips on January 18, 1957, in violation of 22 D. C. Code § 1502 (Supp. VI, 1958), *supra*, p. 3) (R. 86-87). There was evidence in support of the above counts (R. 93-102, 104-106, 107-114, 116). Petitioner was sentenced to imprisonment for one to three years on counts 1, 2, and 3, and to one year on count 5, the sentences to run concurrently (R. 132).

In No. 14,601 (Crim. No. 1156-57) petitioner was found guilty by the jury (R. 78) on count 1 (promoting a lottery from about September 24 to October 1, 1957); count 4 (numbers sale to one Bigelow on October 1, 1957); and on count 5 (possession of numbers slips on October 1, 1957) (R. 9-10). There was evidence in support of the above counts (R. 14-19, 36-44, 46-47, 50, 51). Petitioner was sentenced to imprisonment for 8 months to 2 years on count 1, 8 months to 2 years on count 4, and one year on count 5, the sentences to run concurrently (R. 80).

The sentences imposed in No. 14,617 were ordered to take effect at the expiration of the sentences imposed in No. 14,601 (R. 132).

In both cases, a motion was filed prior to trial to dismiss all the counts subsequent to count one (charging promotion of a lottery) on the ground that the "counts subsequent to Count One of the indictment are included therein and that the indictment is therefore duplicitous" (R. 11, 88). These motions were denied after government counsel had made his opening statement (R. 12-13, 91-92, 88-89). Similar motions, at

the close of all the evidence in each case, to compel an election between count one and the subsequent counts, were also overruled (R. 62-63, 118).

On the appeals (R. 80, 132-133), the convictions were unanimously affirmed (R. 134-136). The court of appeals held that, even if there were merit to petitioner's claim that operating a lottery and the sale of numbers were part of one transaction, rather than separate offenses, he could not complain since he had received concurrent sentences (R. 135).

## ARGUMENT

The thrust of petitioner's argument is that, since he was charged in the indictments with multiple crimes when there was only one crime or course of conduct, *i. e.*, the operation of a lottery under 22 D. C. Code § 1501, he was denied a fair trial. The claim is that in these circumstances the multiple charges operated prejudicially and therefore the rule in *Hirabayashi* v. *United States*, 320 U. S. 81, should not have been applied.[1]

Petitioner's premise is that the offense of possessing and selling numbers slips necessarily merged in the more general offense of conducting a lottery. But on his own theory, whether correct or not, the evidence admissible on the counts charging possession and sale would be admissible as tending to prove the operation

[1] In *Hirabayashi*, this Court stated (p. 85):

"* * * Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained. *Brooks* v. *United States*, 267 U. S. 432, 441; *Gorin* v. *United States*, 312 U. S. 19, 33."

of a lottery. Thus no prejudice could have resulted from the fact that the crimes which petitioner alleges were lesser included offenses were separately charged. And petitioner, having received only one sentence for what he claims was only one offense, is in no position to complain. *Coupe* v. *United States*, 113 F. 2d 145, 148 (C.A. D.C.), certiorari denied, 310 U.S. 651.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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